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"THE decision of the Court of Appeal in *Badeley* v. *Consolidated Bank*, 38 Ch. Div. 238, is or ought to be the last nail in the coffin of the old doctrine that participation in profits is anything more than evidence — not different in rank from any other evidence — that the partaker is a partner. Sharing profits is evidence of partnership, and may be ample evidence. But where it occurs only as one term or incident, we are not to take it first by itself, and say that it raises a presumption of partnership, and that a partnership there must be unless this presumption is specifically negatived by some other clause or circumstance. The transaction must be judged and regarded as a whole." 4 Law Quart. Rev. p. 482.

WE note an apparent error at p. 161 (2d edition) of Mr. Dicey's "Lectures on the Law of the Constitution." In speaking on the conservatism of federalism he says: "The principle that legislation ought not to impair obligation of contracts has governed the whole course of American opinion," and states that had the English courts recognized the inviolability of the obligation of contracts in the same way as the American courts have done, the Irish Land Act, the Irish Church Act (1869), and the reformation of the Universities would have been considered unconstitutional. Mr. Dicey seems to understand that there is a limitation of the sort referred to on the power of our federal government. That this is not the case appears from the language of the Constitution itself, and also from the following authorities: *Buckner* v. *Street*, 1 Dillon (Circ. Ct.), 248; and *Hepburn* v. *Griswold*, 8 Wall. 637, in which it is said: "But while the Constitution forbids the States to pass such laws (viz., laws impairing the obligation of contracts), it does not forbid Congress." See also 8 Am. L. Rev. pp. 194–196.

THE number of students registered up to date in the Law School is 220. Of these, 27 are third year, 67 second year, 74 first year, and 52 special.

The new students are 105 in number, and come from the following States: Mass., 46; N. Y., 11; Ill., 6; Penn., 5; Ohio, 4; Me., 3; Cal., 3; Ind., 3; Md., Ky., N. J., Wis., Conn., and Mich., 2 each; Tenn., W. Va., Vt., Del., La., R. I., W. T., and Mexico, 1 each. Seventy-four have college degrees: Harvard, 47; Mass. Inst. Tech., Tufts, Amherst, and Yale, 3 each. One each from Univ. of Mich.,

Dartmouth, Brown, Colby Univ., Notre Dame, Kenyon, Ky. Mill. Inst., Cambridge Univ., Hanover, Princeton, Centre Coll., Univ. of Cinn., Wesleyan, Cornell, and Norwich Univ.

Compared with the number of students registered in October of last year (1 HARV. LAW REV. 145), these figures show an increase of 18 in the total number, and a decrease of 6 in the number of new students, which would indicate that a greater proportion now remain to complete the entire course. The total number of students registered during all of last year was 215, or 5 less than the number already registered this year.

The proportion of the new men who are college graduates is slightly increased.

IN the recent English case of *Reg.* v. *Serné*, 16 Cox C. C. 311, Stephen, J., in a dictum, expresses decided distrust of the old common-law doctrine laid down by Lord Coke, that the accidental killing of a person through an act done with an intent to commit felony — as, for example, the shooting at a fowl with intent to kill it — is murder. He doubts whether that is "really the law," and whether it would be followed by the courts to-day, and says: "Instead of saying that any act done with intent to commit a felony, and which causes death, amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death, done for the purpose of committing a felony, which caused death, should be murder. As an illustration of this, suppose that a man, intending to commit a rape upon a woman, but without the least wish to kill her, squeezed her by the throat to overpower her, and in so doing killed her, that would be murder." "The Law Quarterly Review,"[1] in commenting upon this case, says: "It is very desirable that the criminal law should not be at variance with the moral sense of the community. Doubting is a very convenient first step towards getting rid of archaic portions of the law." It is to be hoped that this doubting process will continue until the common law is brought squarely into conformity with the doctrine suggested by Mr. Justice Stephen.

"The Law Quarterly" also points out that, as the doctrine now stands, "the books of authority are not even consistent in absurdity on this point;" for if A fires a pistol at B under such provocation that if he killed B it would be only manslaughter, and the bullet strikes and kills X, this is held to be only manslaughter, although by Coke's rule it is clearly murder. This critcism, however, apparently overlooks the fact that this inconsistency would not be obviated by the adoption of Mr. Justice Stephen's rule. The killing of X would be, in theory, as clearly murder by his rule as by that of Lord Coke, and the present holding of the courts as inconsistent therewith.

THE Governor of Kansas was recently reported to have made an interesting innovation in the use of the pardoning power by granting a pardon to a wife-murderer on the condition that he abstain in the future from the use of intoxicating liquors, relying, it is said, upon an Iowa decision holding such a pardon valid. Additional authority is also to be found in a dictum in the case of *U. S.* v. *Wilson*,[2] quoted in 1 HARV. LAW REV. 244, in which Marshall, C. J., in support of the

[1] Vol. 4, p. 489. [2] 7 Pet. 150.

doctrine that a pardon is not valid until accepted, said: "A pardon may be conditional, and the condition may be more objectionable than the punishment inflicted by the judgment."

There seems to be little doubt that a condition precedent may validly be attached to the granting of a pardon; that is, for example, that a final pardon can be granted on condition that the criminal promises never to use intoxicating liquors again. Of course, in such case, if he should subsequently break his promise, he would incur no penalty therefor. Can the condition also be made in the form of a condition subsequent; that is, can a pardon be granted, analogous to a continuing respite, to hold good so long as the criminal does not, in fact, drink? It has been somewhat ingeniously suggested that in this case the prisoner, on drinking, would not be hung for the murder, which had been pardoned, but for the drinking, or that, in other words, the governor is thereby given power to make intoxication a capital offence. This criticism, however, overlooks the fact that the original crime has never been pardoned, but the punishment has merely been suspended on a certain condition, on the breaking of which the original judgment revives in full force.

On the whole, the more reasonable view would seem to be that such a pardon, with condition subsequent, is invalid, and that when once given upon whatever condition, the pardon should be final. The position of a condemned murderer, turned loose upon the community, subject to reimprisonment and execution in the event of drinking liquor, would be anomalous and absurd.

THE Supreme Court of Washington Territory has just given an interesting decision in the case of *Bloomer* v. *Todd*, reported in 38 Alb. L. Jour. 288. It seems that, by a recent territorial act, the right of suffrage was extended to women. Under that act the plaintiff, a woman, tried to vote in a city election within the Territory; but her ballot was refused by the election judges, and she brought suit against them. The defendants demurred to her complaint, and the demurrer was sustained in the District Court. The plaintiff appealed to the Supreme Court of the Territory, who sustained the former judgment on the ground that the territorial act was void as being in conflict with § 5506 of the United States Revised Statutes, providing that "the qualifications of voters and of holding office . . . shall be such as shall be prescribed by the Legislative Assembly: provided, that the right of suffrage and of holding office shall be exercised only by *citizens* of the United States above the age of twenty-one." The basis of the decision was that by "citizens" was meant only *male* citizens, since that was all that the framers of the statute had in mind when they drew it up.

In view, however, of the fact that there is a definition of the word "citizen" in an amendment to the U. S. Constitution, which negatives any such limited meaning, the decision would seem to be wrong. The Fourteenth Amendment provides that "*all persons* born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside." Women clearly come within this definition of citizens. The amendment having thus given a legal meaning to the word "citizen," the presumption should be that it is used in that sense. Although this definition was

given after the word had been used in the Constitution, still it was confessedly intended to be an explanation applicable to the Constitution, and to the U. S. Statutes then in existence; still more would it seem to apply to the interpretation of statutes passed by Congress subsequent to the adoption of the Fourteenth Amendment.

LORD CHANCELLOR HALSBURY, in the recent House of Lords case of *Leader* v. *Duffey*, 13 App. Cas. 294, at 301, uttered a vigorous protest, by way of dictum, against "rules of construction" for the interpretation of written instruments. He says: "All these refinements and nice distinctions of words appear to me to be inconsistent with the modern view — which is, I think, in accordance with reason and common sense — that, whatever the instrument, it must receive a construction according to the plain meaning of the words and sentences therein contained. . . . But it appears to me to be arguing in a vicious circle to begin by assuming an intention apart from the language of the instrument itself, and having made that fallacious assumption, to bend the language in favor of the assumption so made."

A "rule of construction" is not, as was pointed out by Mr. Hawkins,[1] a rule which gives to certain words a certain definite meaning, entirely independent of intention, as, for example, the rule in *Shelley's Case*, which is a rule of substantive law; it is a rule "determining the construction which the courts are bound, *in the absence of a sufficiently declared intention to the contrary*, to put upon particular words," giving to those words a certain *prima facie* meaning, but always containing the saving clause, "unless a contrary intention appear." That is to say, a "rule of construction" is a rule of presumption, giving to certain words a *prima facie* meaning, which is binding upon judge and jury until contradictory evidence, and, in some cases, a certain amount of contradictory evidence, has been introduced to show that another meaning was intended.

In regard to these rebuttable presumptions the Lord Chancellor seems to think that such is the danger that judges will bend the other evidence of intended meaning to fall in with the presumed meaning, that it would be better to abolish these presumptions altogether. The dictum can scarcely be supported from this point of view, these presumed meanings being generally based upon motives of policy and upon what experience has shown to be a probability in fact, in regard to the intention of parties ordinarily using such words. They not only furnish a convenient starting-point for ascertaining the intended meaning, but they rest upon such a basis of policy and of probable fact that they should be conclusive in the absence of conflicting evidence.

The dictum, however, is valuable, in so far as it points out the danger of twisting the other evidence of intention to accord with the presumption, and calls to mind the often-forgotten fact that when evidence of a contrary intention has been introduced, the presumed meaning falls to the ground, and the meaning is to be ascertained from *all* the evidence of intention in the case, the presumed meaning having no greater weight as evidence of intention than that to which it is entitled by the evidentiary force of the probability upon which it rests,

[1] Hawkins on Construction of Wills, Sword's ed., Preface, p. v.

and the logical inference to be drawn therefrom. [See Chamberlayne's Ed. of Best on Evidence, p. 298, note, 1 A (b).] The temptation for judges to give these presumed meanings, when brought in conflict with other evidence, far greater evidentiary force than that to which they are entitled from their intrinsic probability, is a danger which needs to be guarded against. A modification of this general statement is, of course, necessary for those "rules of construction," as, for example, the rule that a gift to testator's children means to his legitimate children only, which, resting not only upon the basis of inherent probability, but also upon special motives of policy, cannot be weighed in evidence, are held to be *strong presumptions*, and are presumed to be true until enough conflicting evidence is introduced, *clearly* to establish that they are not true.

As indications of the general tendency of modern law, in other matters than the construction of instruments, either to destroy entirely these rebuttable presumptions for the ascertaining of the intention of the parties, or to attach to them less evidentiary force, may be mentioned the fate of the old doctrine as to the presumption of partnership arising from a participation in profits, already referred to in a preceding note. In England, participation in profits now seems to raise no presumption of partnership whatever:[1] in the United States the amount of evidence necessary to overthrow it has been much diminished. So, too, may be instanced the growing discredit which has fallen upon the doctrine that in sales of personal property the fact that the price of the goods, otherwise in a deliverable condition, remains to be fixed by weighing, measuring, or numbering, establishes a presumption that the title does not pass until the act of weighing, measuring, or numbering be performed. This has fallen from an almost irrebuttable presumption, to be regarded either as establishing no presumption at all, or else a presumption which can be overthrown by slight evidence of contrary intention.[2]

THE case of *Dorr* v. *Lovering*, 19 N. E. Rep. 224, decided by the Supreme Court of Massachusetts on Oct. 22d, is an important decision, overruling *Lovering* v. *Lovering*, 129 Mass. 97, and bringing the Massachusetts courts again in line with the proposition: "that when, on a gift to a class, the number of shares is definitely fixed within the time required by the Rule against Perpetuities, the question of remoteness is to be considered with reference to each share separately." Gray on Perpetuities, p. 263.

We make the following extracts from the opinion, which was delivered by Morton, C. J. The italics are ours.

"The thirteenth article of the will of Joseph Lovering devises certain real estate to trustees upon the following trusts: to pay the net rents and profits to Nancy Gay, a daughter of the testator, during her life; and upon the decease of said Nancy to pay the net income to her children during the lives of said children; . . . and 'as said Nancy's children shall successively decease, a proportion of said estate or the

[1] Cox *v.* Hickman, 8 H. L. Cas. 268; s. c. Ames' Cas. Partnership, 47; Mollwo, Marsh & Co. *v.* Court of Wards, 4 Pr. Coun. App. 419; s. c. Ames' Cas. Part. 79; Badeley *v.* Consolidated Bank, 38 Ch. D. 38.

[2] Logan *v.* LeMesurier, 6 Moore Pr. Coun. Cas. 116; s.c. Langdell's Sel. Cas. Sales, p. 681; Turley *v.* Bates, 2 H. & C. 200; s.c. Langd. Cas. Sales. 692; Martineau *v.* Kitching, L. R. 7 Q. B. 436, at 449; Terry *v.* Wheeler, 25 N. Y. 520; s. c. Langd. Cas. Sales, 706; Groat *v.* Gile, 51 N. Y. 431; Burrows *v.* Whittaker, 71 N. Y. 291.

proceeds are to be conveyed and distributed to and among the respective heirs-at-law of each child so deceasing, said Nancy's grandchildren to take in right of representation of their deceased parents.'

"This clause of the will has been twice before the court. In *Lovering* v. *Worthington*, 106 Mass. 86, it was held that the limitation of life estates to the children of Nancy Gay were not void for remoteness.

"In *Lovering* v. *Lovering*, 129 Mass. 97, the precise question now raised was decided. It was held that the limitations over to the heirs of George H. Gay, a son of Nancy, was void for remoteness. But the only question argued in that case was whether the devise of life estate to the children of Nancy Gay opened to let in children born after the death of the testator. The counsel for the grandchildren conceded that if after-born children were included in the devise, the limitations over to the heirs of the children of Nancy Gay was void for remoteness. The court, therefore, did not discuss the question, but, accepting the concession of the counsel, considered only the question argued by him.

"Under these circumstances we feel bound to consider the question now raised as if it were a new question.

"The general rule is well settled that in judging of the question of remoteness of an executory devise we must take our stand at the death of the testator, and that such devise is void unless it takes effect *ex necessitate* and in every possible contingency within the period of a life in being and twenty-one years afterwards. *Hall* v. *Hall*, 123 Mass. 120, and cases cited. . . . .

"The case (at bar) falls within the decision in *Hills* v. *Simonds*, 125 Mass. 536, . . . (in which) the case was presented of a devise of a life estate to the testator's son, with a limitation over of life estates to certain described nephews and nieces (*i.e.*, the children of certain brothers and sisters), and with further limitations over . . . of the particular and separate share of each nephew and niece to his or her children or legal representatives. . . . Assuming that the devise to nephews and nieces would open to let in after-born nephews and nieces, yet the share which each is to take must be ascertained at the end of lives in being at the death of the testator. . . . We think it was correctly held that the ultimate limitations over which applied to the respective shares of the nephews and nieces *who were living at the death of the testator* were not void for remoteness, as the remotest period at which such devises over must take effect is the end of the respective lives of such nephews and nieces.

"We have carefully reconsidered this case, because, as we have before stated, the case at bar cannot be distinguished from it. Mrs. Nancy Gay had eight children living at the death of the testator. We will suppose, for the purpose of the discussion, that she had a son born after the testator's death. . . .

"It has already been decided that, whether there are after-born children or not, the devise of life estates to the children of Nancy Gay is clearly valid. But upon the death of Nancy Gay the precise share of each child is ascertained and determined. . . . The will provides that, . . . 'as said Nancy's children shall successively decease, a proportion of the said estate, or the proceeds, are to be conveyed or distributed to and among the respective heirs-at-law of such child so deceasing, said Nancy's grandchildren to take in right of representation of their deceased parents.' This provision . . . clearly means that, upon the death

of each life tenant his share shall be divided among his heirs-at-law, and so on upon each successive death of the children of Nancy Gay. It contemplates that, at the death of Nancy Gay, each of her children is to have a separate and independent share, and it looks to separate and independent division of each share, at different times and to different persons. As each child dies his heirs are to take. . . . The intention of the testator cannot be carried out except by regarding this provision as separate and distinct devises to different classes, which take effect at different times, upon the respective deaths of the life tenants. The legal heirs of each child, upon his death, take his share of the estate, and *as the devise to the heirs takes effect at the death of their ancestor who had the life estate, it follows that in the case of all the children who were living at the death of the testator the devise over is not void for remoteness. In the case supposed of the after-born son, the devise over would be invalid, but this would not affect the distinct devises in favor of the heirs of his brothers and sisters; because the estates devised to them must vest within the period prescribed by law.* We are compelled to the conclusion that the concession of counsel, and the decision of the court in *Lovering* v. *Lovering*, *ubi supra*, to the effect that the gifts over to the heirs-at-law of the children of Nancy Gay were void for remoteness, were erroneous. *Catlin* v. *Brown*, 11 Hare, 372; *Griffith* v. *Pownall*, 13 Sim. 393; *Wilkinson* v. *Duncan*, 30 Beav. 111; *Storrs* v. *Benbow*, 3 De G., M. & G. 390; *Pearks* v. *Moseley*, 5 App. Cas. 714.

"The result of this is that the heirs-at-law of Ann L. Gay, are entitled, under the thirteenth clause of the will, to the property in which she had a life interest."

For a full discussion of the principle involved in this case, and of the authorities *pro* and *con*, see Gray on Perpetuities, pp. 260–267. Mr. Gray was of the counsel in this case, representing the heirs of Ann L. Gay.

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

ASSUMPSIT — WORK AND LABOR BY WIFE FOR SUPPOSED HUSBAND — MISTAKE OF FACT. — A woman married a man and lived with him till his death. She afterwards learned that he had a former wife, still living, from whom he had not been divorced. *Held*, that she could not recover from his administrator for work and labor in keeping house for him during his life. *Cooper* v. *Cooper*, 17 N. E. Rep. 892 (Mass.); s. c. 16 Mass. Law Rep. (No. 35) 15.

This case is probably law. Compare cases where a negro has failed to recover the value of services rendered on the supposition that he was a slave. *Alfred* v. *Marquis of FitzJames*, Esp. 3; *Livingston* v. *Ackeston*, 5 Cowen, 531; *Negro Franklin* v. *Waters*, 8 Gill, 322. But see *contra*, *Negro Peter* v. *Steel*, 3 Yeates, 250; *Jarrat* v. *Jarrat*, 2 Gilman, 1, *semble*; *Kinney* v. *Cook*, 3 Seammon, 232, *semble*.

The argument in these cases appears to be that the service is gratuitous, and that there can be, consequently, no implied obligation to pay for it. But there seems to be no sound objection to treating them as cases of mistake of fact, where the plaintiff recovers the reasonable worth of something given or done because of a supposed legal obligation. However, it is not quite so clear that a